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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958

Civil No. 331

CHARLES E. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINORE PROUTY MALLORY AND THIRD NATIONAL BANK AND TRUST CO.,

Petitioners

vs.

CITIZENS UTILITIES COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT

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Petitioners,

vs.

CITIZENS UTILITIES COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The Circuit Court Of Appeals For The Second Judicial Circuit.

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The Petitioners, Charles T. Prouty, Genevieve Prouty Gage, John A. Prouty, Elsinore Prouty Mallory and Third National Bank and Trust Co., respectfully show as follows:

The Statement of the Case, Findings of Fact, Conclusions of law, and Judgment Order of the United States District Court for the District of Vermont, R.*33a—48a,

**Refers to Appendix filed in the Court of Appeals, now a part of the record in this case.*

(322-337) are reported in 150 F. Supp, 892. It made a decree of specific performance that Defendant pay Plaintiffs the contract price for property, which Defendant had agreed to buy.

The Circuit Court of Appeals for the Second Circuit, on the third day of July, 1958, filed an Opinion reversing the decision of the District Court. But it did not direct that this suit be dismissed. There has been no official report of the opinion of the Court of Appeals. A copy is attached in the Appendix. It held that the District Court lacked jurisdiction because of an eminent domain proceeding before the Vermont Public Service Commission relating to the same property.

I. STATEMENT OF JURISDICTIONAL GROUNDS

Section 1254 of the United States Code Annotated is the statutory provision believed to confer on this Court jurisdiction to review the opinion and holding of the Circuit Court of Appeals. See also Supreme Court Rule 19.

One ground of federal jurisdiction is diversity of citizenship due to the fact that the five petitioners are citizens of states other than Delaware, of which latter state the respondent, Citizens Utilities Company, is a corporation and citizen. R.2a (248); 12a (260); 34a (323).

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars. R. 34a (323).

Another ground for federal jurisdiction is that the action arises under the "Federal Power Act" June 10, 1920, c. 285, Sec. 320, added August 26, 1935, c. 687, Title II, Sec. 213, 49 Stat. 863, U. S. Code, Annotated Title 16, Sections 797 & 814-817. R. 2a, 3a, (248, 249). Parts of Sections 797 & 814 & 817 are attached in the Appendix.

II. THE QUESTION PRESENTED FOR REVIEW

Did the District Court of Vermont have jurisdiction to grant relief in an equitable *in personam* suit for specific performance of a contract to buy land, including various structures and improvements thereon, and appurtenant

water power already in the possession of the Respondent as tenant of the Petitioners, R. 4a (250) R. 35a, 36a (324); notwithstanding the pendency of a prior eminent domain proceeding before the Vermont Public Service Commission instituted by Respondent? The only controversy is the price to be paid for the property.

More briefly stated: Does a prior so called eminent domain proceeding prevent the District Court from granting purely equitable relief in a suit for specific performance of a contract involving the same property?

III. STATEMENT OF THE CASE.

The Respondent, a public utility corporation supplying electric power locally and in interstate and foreign commerce, is in possession of the land under a 25-year lease made in 1930 between the Petitioners' predecessor in title, as lessor, and the Respondent's predecessor, as lessee. The lease provided that it should enure to the benefit of, and be binding upon, the heirs, successors and assigns of the respective parties. By the terms of the lease the Respondent was obligated to buy, and the Petitioners to sell, the leased property within six months after the termination of the lease on October 1, 1955, at a price to be agreed upon, or failing agreement, at a price to be determined by condemnation proceedings to be instituted by the Respondent within said six months period "before the tribunal then having jurisdiction of such proceedings." If such proceedings were not instituted within said six month's period, the price to be paid for the property was $300,000. No agreement as to price having been reached, the Respondent, on March 27, 1956, without first obtaining proper authorization from the Federal Power Commission pursuant to the Federal Power Act, filed a petition to have the Vermont Public Service Commission fix the price for the property. This petition sets forth and is based upon the contract. (Exhibit B, R. 245) reproduced in the Appendix at the close of this Petition.

The Petitioners claim that the Vermont Public Service Commission does not have jurisdiction of the eminent domain proceedings as required by the contract for the reason

that the waters involved are navigable (as the District Court found) and, consequently, subject to the Federal Power Act, which provides the method of condemnation and the pre-requisites therefor, including a license from the Federal Power Commission, and that such a license was a condition precedent to the institution of condemnation proceedings. This requirement had not been met by the Respondent. The action in the District Court was then begun, and the Public Service Commission has taken no action. The petition before it is still pending. (R. 6a (252) 7a (253); 8a (254); 14a, 15a (262); 40b, 41a (328-330).

Notwithstanding the contentions of the petitioners that they had no adequate remedy at law, that the Vermont Public Service Commission could not grant them adequate relief, or any relief not requiring resort to other tribunals for enforcement, and that a Court of Equity had jurisdiction to dispose of all issues raised in the Federal suit and grant complete relief, the Court of Appeals, in its Opinion, held that the petition before the Vermont Public Service Commission was a "suit *in rem*" and that for the Federal Court to decree specific performance of Respondent's contract to buy the land was a violation of the rule that the Court first assuming jurisdiction over property may maintain and exercise its jurisdiction to the exclusion of the other.

Thus, the Court of Appeals held, in effect, that only the Public Service Commission could fix the price for the property and that only the Public Service Commission, though it is not a court, could interpret and apply the contract in order to determine the jurisdictional question on which depends the right of the Petitioners to recover the stipulated price. Thus the Petitioners, by the decision of the Court of Appeals, are compelled to try their suit for specific performance piecemeal, by first submitting a part of the issues, i.e., the jurisdictional question, to the Vermont Public Service Commission, and if they are there successful, then by further prosecution of the present suit in the United States District Court for appropriate relief under the contract.

The Court of Appeals has not given any or sufficient consideration that (1) this proceeding does not require con-

trol of the property described in order to make effective a judgment order of the District Court nor (2) that the proceeding before the Public Service Commission does not require control of the property described in order to make effective its order.

Yet control of property is the vital element in determining whether an action is *in rem* or *in personam*. (The words "in rem" are meant to include "Quasi in rem" throughout.)

IV. SUMMARY OF ARGUMENT.

The Petitioners contend that the opinion of the Circuit Court of Appeals is in conflict with applicable decisions of the United States Supreme Court and of the Supreme Court of Vermont to the effect that a Court of Equity may grant complete relief in order to avoid circuity of action, and that the opinion does not give proper effect to the applicable decisions of the United States Supreme Court as to comity and jurisdiction; that the reason for the rule invoked by the Circuit Court of Appeals is the necessity for avoiding physical conflict over the res, although here the decree of the District Court of the United States granting specific performance and a judgment for the contract price, in no way affected the physical control of the property which has long been in the possession of the Respondent and which under the terms of the contract will so continue until the price therefor is fixed, and paid by the Respondent.

The Petitioners further contend that the decree of the District Court was strictly *in personam* and as such should be upheld.

V. ARGUMENT.

1. The Court of Appeals decided the question of alleged conflict of jurisdiction in a way in conflict with the decisions of this Court.

Commonwealth Trust Co. v. *Bradford*, 297 U. S. 613, 618-620;

Kline v. Burke Construction Co., 260 U. S. 226, 228, 230, 235;
General Baking Co. v. Harr, 300 U. S. 433, 434;
Fischer v. American United Life Ins. Co., 314 U. S. 549, 554-555;
Waterman v. Canal Louisiana Bank Co., 215 U. S. 33, 43-46.
Dempsey v. Pink, 92 Fed. 2nd, 572.

and other applicable decisions.

These controlling decisions should be sufficient, without further argument, to demonstrate the error in the opinion and holding of the Court of Appeals. From them it clearly appears that:

The necessity for control of the property is the test as whether the court in which the proceedings are first instituted has exclusive jurisdiction. As a corollary it follows that where such necessity does not exist, the reason for the rule invoked by the Court of Appeals fails, and, consequently, the District Court did have jurisdiction to grant relief *in personam* by decreeing specific performance of the contract.

Cases involving the question about jurisdiction of the Federal and State Courts affecting property or arising out of claimed rights in respect to the property may be divided into three classes.

(A) Where both actions are *in rem* and consequently control of the property is required in both in order to give effect to the judgments. In these the jurisdiction of the court first acquiring control of the property is exclusive of the other.

(B) Where both actions are *in personam* and consequently control of the property is not necessary to give effect to the judgment. In these the jurisdictions are concurrent and the decision first rendered is pleadable as *res adjudicata* in the other jurisdiction.

(C) Where one of the actions is *in rem* and the other *in personam*, the rule is the same as in B.

This classification is established by the decisions of the United States Supreme Court, and the only problem is to

determine whether the actions are *in rem* or *in personam*. The factor in determining this question is whether or not control of the res is required to give effect to the judgment.

The proceedings before the Public Service Commission and this suit in the District Court are both actions *in personam*, as they do not involve the possession or control of the property. Control has already been determined by the lease and contract of the parties and neither tribunal could change it. The difference between the parties is as to the amount to be paid which does not and cannot in any way affect control.

Commonwealth vs. Bradford, 297 U. S. 613, involved the question of jurisdiction of the Federal Court and its appropriate exercise in a suit by the receiver of a national bank against a trustee appointed by a state court, to establish the rights of the plaintiff in the trust fund.

The Orphans' Court authorized distribution of assets, excluding the Receiver from participation. The Receiver then brought this equity action to establish his claim.

The Court said that the receiver did not seek direct interference with control of the assets and that the Federal Courts had jurisdiction of suits against fiduciaries subject to the jurisdiction of probate courts as they were not actions *in rem*; that such suits adjudicate questions which precede distribution and concluded:

> "The final decree produced no interference with the trustee's possession, nor with the power of the Orphans' Court to order distribution of assets. The Receiver's privilege to participate has been declared; only a judgment in personam was rendered." (297 U. S. 620)

In *Kline vs. Burke Construction Co.* 260 U. S. 226, 229-230, 235, the decision of the Court of Appeals was that an injunction should issue against a State Court in a case which involved in substance the same matters as were involved in the Federal suit previously brought. The Supreme Court in reversing said:

> "But a controversy is not a thing, and a controversy over a mere question of personal liability does

not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action on the same cause in another jurisdiction is not precluded." * * * (260 U. S. 229-230)

* * * * *

"The rank and authority of the Courts are equal but the both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist, in actions in rem, and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter." (260 U. S. 235)

General Baking Co. vs. *Harr* 300 U. S. 433, is directly in point here. It was brought to this Court by certiorari to review a judgment of the Court of Appeals reversing a judgment of the District Court.

The State Secretary of Banking closed the Franklin Trust Co. and took control of its assets. Petitioner sought to recover funds held by the bank under an agreement and

the judgment of the District Court was in his favor. The Court of Appeals held the District Court had no jurisdiction and should have dismissed the suit. On authority of *Commonwealth Trust Co. vs. Bradford* 297 U. S. 613 this holding was reversed by the Supreme Court.

Manderville v. Canterbury, 318 U. S. 47, 49, cited by the Court of Appeals is very different from this case. Plaintiff there sought to have a will construed, claiming an interest in a trust fund created by the will and to have the trustee account therefor. He also asked for an injunction against subsequent proceedings in other states wherein adjudications were sought of the rights of the parties in the land belonging to the trust and located in such other states. The injunctions were denied because the actions were held to be *in personam* and did not require possession or control of the land in the other states. The District Court's jurisdiction of the action was not questioned.

The following extract from the opinion completely supports the Petitioners' contentions here:

> "But where the judgment sought is strictly *in personam* for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other." (318 U. S. 49)

U. S. v. Bank of N. Y. 296 U. S., 463, 477-478, cited by the Court of Appeals held that the Federal Court did not have jurisdiction of a suit for an accounting and delivery of funds in the custody of the Bank under orders and judgments of the state courts providing for liquidation and distribution. The Court said:

> "Complainant demands that the depositaries account and pay over to the complainant, as 'the sole and exclusive owner,' the entire funds in their hands. Thus the object of the suits is to take the property from the depositaries and from the control of the state

court, and to vest the property in the United States to the exclusion of all those whose claims are being adjudicated in the state proceedings." (296 U. S. 477-478.)

Such clearly is not the situation here, since the relief sought in the Federal Court is merely *in personam*, and in no way requiring control of the property or interfering with the state tribunal.

In *Princess Lida* vs. *Thompson* 305 U. S., 456, 466-467, cited by the Court of Appeals, it was held that the exercise of jurisdiction by the state court over the *administration of a trust fund* deprives the Federal Court of jurisdiction of a *later suit* involving *administration of the same trust fund* because the former had possession and control of the fund in numerous ways stated with great particularity in the opinion; an entirely different situation than exists here.

The Court of Appeals further erred in its interpretation and application of the statute against a stay of State court proceedings, 28 U. S. C. A. Sec. 2283. Subsequent to the decision in *Toucey* vs. *New York Life Insurance Co.*, 314 U. S. 118, the statute was amended.

The former section, Title 28, U. S. C., 1940 ed., Sec. 379 (Mar. 3, 1911, ch. 231, Sec. 265, 36 Stat. 1162), lacked the words in the present statute permitting a United States Court to stay proceedings in a State Court "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Moreover, the Circuit Court should not have relied on *National Quarries Co.* vs. *Detroit T. & I. R. Co.*, 6 Cir., 10 F. 2d 139, 140. The present situation is to be distinguished from the case cited, because here the petitioners are seeking specific performance, an equitable remedy which cannot be granted by the Vermont Public Service Commission or any State Court upon appeal from the Commission, and here the suit is *in personam*.

Vicksburg Water Works Company vs. *City of Vicksburg*, 185 U. S. 65, involved a contract and equity took jurisdiction to prevent a threatened injury where a municipal ordinance was invoked to nullify the contract. The Vicksburg case is applicable here and shows that the Vermont District Court was right in granting specific performance, because the

plaintiffs could not obtain adequate relief by specific performance from the Public Service Commission.

The point of *U. S.* vs. 625.91 *Acres of Land*, 49 Federal Supplement, 997, is that the rule invoked by the Court of Appeals is based upon necessity, and where the necessity does not exist, the rule does not apply, as the Court there said:

> "The reason for its creation and long existence is the necessity to avoid physical conflict over the res of the controversy which would result if two courts of concurrent jurisdiction made conflicting orders awarding the subject matter of the action to different parties and *each court sought to enforce* its order. And where the necessity does not exist the rule does not apply." (49 F. S. 999)

Here the decision of the District Court does not adjudicate the right of the Citizens Utilities Company "condemnor in the other action to acquire the property." (49 F. S. 1000). There is no dispute as to who is entitled to the property. The foregoing makes it plain that the Court of Appeals misapplied the principle of the cases upon which it relied.

2. The opinion of the Court of Appeals erroneously rejects the timehonored jurisdiction of a court of equity to grant specific performance and afford all parties complete relief.

It ignored the fact that the Petitioners' suit was an equitable action for specific performance and disregarded the fundamental maxim that historically and primarily equity acts only in personam.

Wilhelm v. Consolidated Oil Corporation, C. C. A. Okla. 84 F. 2d 739, 746 affirming, D. C. 11 F. Supp. 444.
30 *C. J. S.*, page 502.
21 *C. J.*, Pages 194-195.

Waterman v. Canal-Louisiana Bank & Trust Company, supra, is the leading case on this subject. It was there de-

cided that a Court of the United States could entertain jurisdiction in favor of citizens of other states, to determine and award by decrees binding *in personam* their share in the estates of deceased persons.

The case of *Jackson* v. *United States National Bank, Portland, Ore.*, 153 F. Supp. 104, 110-112, contains a valuable exposition of most, if not all, of the principles controlling in the present case. While the federal suit was dismissed because the principal controversy was "beyond the historic scope of federal equity jurisdiction" (a situation obviously not here present) the opinion is most helpful.

It recognizes the historic obligation of equity to do justice completely and not by halves. See cases therein cited.

So here, the Petitioners in an equitable suit were entitled to a decree for specific performance requiring the respondent to pay the stipulated contract price.

First National Bank v. *Laperle*, 117 Vt. 144, 155, which was a suit in equity to obtain specific performance of a contract for the sale of land in favor of the vendor, though the relief obtained was for the recovery of money only.

See also:

Harkin v. *Brundage*, 276 U. S. 36, 72 L. Ed. 457, 48 S. Ct. 268;

Griswold v. *Central Vermont Railroad Company*, 9 Fed. 797, Opinion by Judge Wheeler, a greatly respected Judge in Vermont;

Bryant v. *Atlantic Coastline Railroad*, 92 F. 2nd 569 (2nd Circuit);

Art Students League v. *Hinkley*, 31 F. 2nd 469, 471-472;

The Annotation 11 ALR 2nd pages 494-500;

The Cumulative Supplement in Vol. 44 of Am. Jur., subject courts Sec. 251, supplement pages 83 and 84.

In W. P. Stafford's Hand Book of Equity, pages 27 and 28 he says:

"The chancellor's decree was only *in personam*, that is, against the person of the defendant. The law court's

judgments, on the other hand, were *in rem*, that is, against the thing in controversy itself. This is the meaning of the second fundamental maxim of equity, that equity acts *in personam* and not *in rem*. This maxim must always be borne in mind, for it underlies the whole structure, notwithstanding certain exceptions that have been grafted upon it by statute." * * * "It is important to know of such changes, but it is likewise important to understand that they *are* changes, and that except where they have been made by statute the rule still obtains that equity acts *in personam* and not *in rem*."

Sacomb v. Steele 20 *Howard*, 94, 106.

3. Even if the proceeding before the Public Service Commission was a proceeding *in rem*, as stated in the opinion of the Court of Appeals, the District Court has jurisdiction of this action because it is *in personam*. No one has claimed that it is not *in personam*. Only a money judgment by way of specific performance was awarded against the respondent, and this does not in any way affect control of the property.

The Court of Appeals completely ignored this distinction and based its decision solely on its statement that the proceeding before the Public Service Commission was *in rem* making no statement as to the classification of this federal equity action. Clearly, this federal equity suit is *in personam*. Nothing will be or can be done in it to affect the control of the property. The respondent's control will continue. No change in it will or could be made even in the proceeding before the Commission, because the parties are bound by contract in respect to that.

Both proceedings involve only the question of the amount to be paid.

4. In substance the proceeding before the Vermont Public Service Commission is in personam, as distinguished from a suit in rem where control of the property is essential to an effective exercise of jurisdiction.

The decision of the Court of Appeals rests wholly upon the statement that "the petition for condemnation was a suit

in rem, where the tribunal must control the property to give effect to its jurisdiction." This is incorrect as applied to the proceeding before the Commission. The Court failed to distinguish it from the usual condemnation proceeding which involves questions such as necessity and public use. Those preliminary questions must be decided before damages are considered and are the initial stage of the proceeding which requires control of the *res*. *U. S. v. 625.91 Acres of Land, etc., supra*. Those questions are not in the proceeding before the Vermont Public Service Commission which is based on the contract which was attached to the petition to the Commission. (Defendant's Exhibit B, R 19a). By virtue of that contract the Citizens Utilities Company and its predecessors in title have been in possession as lessees and control of the land and will continue so until the price for purchase is fixed and paid, whereupon it will become the owner of it and can compel delivery of the deed, R. 38a (326). By their contract to sell and buy, the parties have eliminated those questions from submission to or consideration by the Commission and thereby made the proceeding one for determination of price only, i.e., *in personam*. The doctrine that applies to condemnation proceedings generally never did apply to the proceedings before the Commission. The Commission never had or needed possession or control of the property. It could not decide what would be done with the property or who would thereafter own it or have possession of it. Those things were governed by the contract and the Commission could not change them. Moreover what the corporation would get when the price had been fixed and paid was not what is obtained in a condemnation proceeding, i.e., an easement to possess and occupy for a public use only but a title conveyed "by good and sufficient warranty deed" * * * "in fee simple, free and clear of all charges and encumbrances." R. 38a. (327).

To paraphrase the sentence in the opinion of the Court of Appeals, which it made decisive of this case,—obviously the Federal Court could decree specific performance of the contract without violating the principle which applies only

when the "State Tribunal must control the property to give effect to its jurisdiction."

As respects determination of price, the jurisdiction of the Public Service Commission is not *in rem*. This is evident from the opinion in *U. S.* v. 625.91 *Acres of Land, supra*, 49 F. Supp. 997,1000.

There it was pointed out that according to all the authorities an eminent domain proceeding ceased to be a suit *in rem* once it had been decided that the condemnor was entitled to the property.

As is abundantly plain in the present proceeding, as a result of the contract between the parties, the question of whether or not the respondent should acquire title to the Petitioner's property is not an issue. The only question is that of price.

The opinion in the case just cited furnishes complete support for the proposition that the proceeding before the Vermont Public Service Commission in substance was not an *in rem* proceeding.

Neither the Federal Court nor the State Tribunal had or needed control of the thing, i.e., the property, which according to the contract R. 22a (268) was in the possession and control of respondent as lessee and would continue so until the price for it should be paid when the title would be conveyed. Both proceedings involved only the question as to the price to be paid, viz. $300,000, or an amount to be fixed by the State Tribunal. They are both *in personam*.

The contract provides that the respondent, as lessee, is to pay the rent and, hence, enjoy the property as tenant until "the date when the Lessee acquires title to the property from the Lessor as herein provided." R. 22a (268); also that the Petitioners must sell and the Respondent must purchase. The only question left for the Commission to decide, apart from the indispensable one of jurisdiction, was the value of the property, namely, "the price which the Lessee shall pay, and the Lessor accepts for the deed above described to said property." R. 21a (268).

5. The Vermont Public Service Commission is not a court. This proposition was established in *Snbre* v. *Rutland Railroad*, 86 Vt. 347, 363.

To the same effect are:

Town of West Rutland v. *Rutland Railway Light & Power Company*, 96 Vt. 413, 422;

Trybulski v. *Bellows Falls Hydro Electric Corporation*, 112 Vt. 1, 7.

The result of these decision is to clearly demonstrate that while "the public service commission is an administrative body clothed in some respects with *quasi* judicial functions" it, nevertheless, is not a court. "It is merely an administrative body created by the State for carrying into effect the will of the State as expressed by legislation." (112 Vt. 7)

Because it is not a court, the Vermont Public Service Commission is without power to enforce its decisions. There is no statutory or other authority for it to issue any process which will require the respondent to pay the price or damages awarded for the property in question. Instead the statutory law of Vermont requires a party to institute an independent proceeding in the Supreme Court where an order or decree of the Public Service Commission is not complied with. The statute on this subject is Section 9299 of the Vermont Statutes of 1947, Chapter 395, Page 1771, and reads as follows:

> V.S. "9299. *Decree of public service commission, enforcement.* A party to an order or decree of the public service commission or the commission itself, or both, may complain to the supreme court for relief against any disobedience of or noncompliance with such order or decree. In such proceedings and upon such notice thereof to the parties as it shall direct, the supreme court shall hear and consider such petition and make such order and decree in the premises by way of writ of mandamus, writ of prohibition, injunction, or otherwise, concerning the enforcement of such order and decree of the public service commission as to law and equity shall appertain."

Here, there were questions of federal law to be determined, although whether the Vermont Public Service Com-

mission had any jurisdiction was the principal issue. Therefore, the Petitioners properly resorted to an equity suit in the District Court which could decide all questions involved, and upon its finding, as it did, that the Vermont Public Service Commission was without jurisdiction, due to the Respondent's disregard of the requirements of the Federal Power Act, the District Court was in a position to grant appropriate relief and by its decree award specific performance of the contract for payment of the price to which the Petitioners were entitled.

In such a situation, it was error for the Court of Appeals to rule that the District Court could not determine the whole controversy.

CONCLUSION

FROM THE FOREGOING IT IS EVIDENT THAT:

1. This case involves questions of unusual gravity and importance, particularly the equity jurisdiction of the District Courts and the principles of comity, which should govern the action of the District Courts in granting *in personam* relief where a State Tribunal has before it a condemnation proceeding, the disposition of which does not require possession or control of the property.

2. There is no conflict in the decisions and statements of the rules of comity or their application in any of the cases above cited including those cited in the opinion of the Court of Appeals.

The decision of the Court of Appeals and its opinion are in conflict with them. It would cause mistakes, misunderstanding, and error, and, therefore, be most unfortunate, to let its decision in this case stand, as it will cause confusion on an important subject which this Court has made clear in the above cited and other cases, a number of which were brought to this Court by certiorari proceedings to correct error in the inferior Courts.

WHEREFORE, in order that the foregoing and other matters may be properly considered and adjudicated, your Petitioners pray that this Honorable Court will grant its writ of certiorari, directed to the Honorable Circuit Court

of Appeals for the Second Judicial Circuit, requiring a complete record of this cause in said Court to be certified to this Court, and that this Court will thereupon proceed to correct the errors of which complaint is herein made, and will reverse the holding and Opinion of said Circuit Court of Appeals reversing the Judgment Order of the District Court of Vermont, and may award to your Petitioners such further and other relief as the nature of the case may require and to the Court may seem proper in the premises; and your Petitioners will ever pray.

Respectfully submitted,

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINORE PROUTY MALLORY AND THE THIRD NATIONAL BANK AND TRUST CO.

Petitioners

By their attorneys

Edwin W. Lawrence

Arthur L. Graves.

PETITION FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS
FOR THE SECOND JUDICIAL CIRCUIT

APPENDIX TO PETITION

DEF EX B ON MOTION FOR DECREE
1-29-57

VERMONT PUBLIC SERVICE
COMMISSION
MAR 27 809 AM 1956

COPY

STATE OF VERMONT

ORLEANS COUNTY, ss.

CITIZENS UTILITIES COMPANY (Newport Electric Division) v. CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY, AND THIRD NATIONAL BANK & TRUST COMPANY	PUBLIC SERVICE COMMISSION No. 2742

PETITION FOR CONDEMNATION

To the Public Service Commission within and for the State of Vermont:

Comes Citizens Utilities Company (Newport Electric Division), a corporation duly chartered, organized and existing under and by virtue of the laws of the State of Delaware and duly licensed and authorized to transact business in the State of Vermont, and brings this, its petition for condemnation of lands and interests therein against John A. Prouty and Genevieve Prouty Gage of the City of Newport in the County of Orleans and State of Vermont; Elsinor Prouty Mallory, now of Redington Beach in the State of Florida; Charles T. Prouty, now of New Haven in the County of New Haven and State of Connecticut and The Third National Bank and Trust Company, a banking corporation having its principal offices at Springfield in the County of Hampden and Commonwealth of Massachusetts, and respectfully shows:

1. Petitioner is a public service company operating and carrying on the business of supplying electric power and energy to ultimate consumers and other utilities and municipalities in the counties of Essex, Orleans, Franklin and Grand Isle within the State of Vermont, pursuant to certificates of public good granted to it and its predecessors in ownership of such utility system by the Public Service Commission, as more fully appear by the records of said Commission.

2. To the extent material in this cause, petitioner is the successor in ownership, management and control of a prior public service company and system previously owned and operated by Newport Electric Light Company.

3. The petitioners above designated in this cause are the present owners of and successors in title to the lands and interests therein previously owned by the late Abbie D. Prouty, now deceased.

4. Petitioner is engaged in the distribution of electrical power and energy for public use as aforesaid and is subject to the jurisdiction of the Public Service Commission and all

the laws of Vermont applicable to a public service company distributing electrical power and energy to the public.

5. Petitioner is now and will be obligated in the conduct of its public service business aforesaid to serve the public on reasonable terms, to render adequate service to the public in the conduct of said public service business, all in accordance with law and pursuant to the regulations of the Commission.

6. Petitioner respectfully shows that the condemnation of the following described realty and interests therein situate in the City of Newport in said County of Orleans is necessary in order that it may render adequate service to the public in connection with its said public service business:

> Being all and the same land and premises which were conveyed by Spaulding Brothers Corporation, a corporation, to Charles A. Prouty by warranty deed dated December 31, 1906, and recorded in Book 27, pages 595 and 596 of the Land Records of the Town of Derby, Vermont, more particularly described as the "Spaulding Pulp Mill Property" so-called, situated on Clyde River in the City of Newport, Orleans County and State of Vermont, a little above the plant of the Newport Electric Light Company, with all water power and water privileges thereunto belonging or appurtaining. Being the same land and premises conveyed to said Spaulding Brothers Company, a corporation organized and existing under the laws of the State of Vermont by three several deeds:
>
> (1) By a quit-claim deed from Edward F. Spaulding to said corporation, dated August 26, 1901, and recorded in Book 25, page 80 of the Land Records of said Town of Derby.
>
> (2) By a quit-claim deed from Waldo Spaulding to said corporation, dated August 26, 1901, recorded in Book 25, page 81 of the Land Records of the said Town of Derby.
>
> (3) And by Huntley H. Spaulding, as administrator of the estate of Jones Spaulding, by an administrator's deed dated August 26, 1901, and recorded in

Book 20, page 300 of the said Land Records, to which deeds and said records thereof, reference is hereby made for a more particular description.

Meaning to include what is known as the Pulp Mill Property, water power, dam, water privileges, and all buildings, machinery and fixtures now on said property, and being the same real estate which was conveyed to the Newport Electric Light Company by Charles A. Prouty by an instrument dated June 29, 1907, and recorded in the Derby Land Records in Book 28, pages 367 and 368; all of said property having been willed to Abbie D. Prouty by the late Charles A. Prouty, and having been decreed to said Abbie D. Prouty by the Probate Court for the District of Orleans, State of Vermont.

7. Petitioner further shows that the said Newport Electric Light Company and the said Abbie D. Prouty, on to wit, the 29th day of July, A. D. 1930, entered into an agreement providing, in substance, for the lease of said property and rights therein to Newport Electric Light Company at an agreed and stated rental for a term of twenty-five years from the first day of October, 1930, subject to payment of one-half of all taxes and assessments levied against said property during the term of the agreement by the lessee in addition to said rentals.

8. Said agreement included a provision for purchase of the property and rights therein by Newport Electric Light Company at the expiration of said rental period, and within a period of six months thereafter, or for proceedings before this Commission by way of condemnation in the event the parties thereto did not agree upon the purchase price within the provisions of said agreement.

9. A full copy of said agreement is attached hereto and incorporated in this petition by reference.

10. Newport Electric Light Company and petitioner as its successor have paid all rentals enumerated in said agreement and the portion of taxes and other assessments set forth therein as the same have become due and payable.

11. That petitioner has not given to the said Abbie D

Prouty or to the petitionees as successors to her interests in said property, and has not received from the late Abbie D. Prouty during her lifetime, her legal representative or the petitionees as successors to her said interests, any notice of any alleged default in performance of the terms of said agreement.

12. Said agreement, of which a compared copy is attached and incorporated herein, provides, in substance, that shall said Newport Electric Light Company, lessee, and petitioner as successor to its interests in said property and rights, not elect to acquire title to such property prior to October 1, 1935, that the lessee agrees to purchase the property and rights within six months after October 1, 1955, and the lessor agrees to sell and convey the premises and rights involved by a good and sufficient warranty deed in fee simple to the lessee, free and clear of all charges and encumbrances against the same at a price satisfactory to both parties to the agreement.

13. That the petitioner and the petitionees, as successors in interest to the property and rights involved in said agreement, respectively, have not agreed upon a price mutually satisfactory and are unable to agree within the period specified in such agreement.

14. Said agreement further provides that if the parties cannot agree upon the price for such property and interests therein, the price shall be determined in the following manner:

"(a) The Lessee shall within said six months period institute proceedings to acquire the property above described by condemnation, such proceedings to be instituted before the tribunal then having jurisdiction of such proceedings. The value fixed in said proceedings for the property herein described shall be the price which the Lessee shall pay, and the Lessor accepts for the deed above described to said property.

(b) If no price is agreed upon by the parties within said six months period, or if the Lessee has not instituted condemnation proceedings within said period as provided in the preceding paragraph, then the price which the Lessor

shall pay to the Lessee for said deed to said property shall be the sum of $300,000.00."

15. Petitioner avers that the price to be paid for said premises and rights as enumerated in paragraph (b) of said agreement, quoted above, is excessive and that the public good does not warrant the expenditure of monies therefor in such amount though the property involved is now, in part, incorporated in and utilized in the production and distribution of electric power and energy to the public and is necessary for such purposes.

16. Petitioner further shows that since October 1, 1955, it has continued the payments to the petitioners in accordance with said agreement, and orders and assignments thereon now in effect, and intends to continue therewith until it acquires title to the property and rights from the petitioners.

17. Petitioner further shows that the condemnation of such property and rights is necessary in order that it may render adequate service to the public in the conduct of its business; that said property and rights of which condemnation is sought and as described in this petition, are identical with the property and rights involved in said agreement, that the so-called Prouty Rights formerly consisted of a low concrete dam on and certain riparian rights along the Clyde River extending from the former Spaulding Mill dam downstream to a point adjacent to or approximately at the upper flowage rights of a former low-head concrete dam owned and then operated by Newport Electric Corporation, a predecessor in title to a portion of the system of the petitioner; that during the season 1931-1932, the former dam of the utility system was reconstructed and a penstock installed therefrom over lands not here involved to the present hydro-electric generating station of petitioner; that the lands and former dam involved in said Prouty Rights, as such, are not used; that the installation of the present dam, penstock and reconstructed generation station is such that the petitioner diverts water past the so-called Spaulding Mill property, referred to as the Prouty Rights, and will continue so to do in the most efficient and effective utilization of the flow of water and the

over-all head of water available at the location of petitioner's hydro-electric generating station.

18. That upon information and belief the late Abbie D. Prouty; during her lifetime, conveyed the property and rights in this proceeding and in said agreement involved to The Boston Safe Deposit and Trust Company as Trustee as appears by conveyances of record in the Land Records of the City of Newport, Vermont, whereby the income from and proceeds of such property were held for the benefit of the said Charles Tyler Prouty, Genevieve Prouty Gage, John A. Prouty and Elsinor Prouty Mallory.

19. That upon information and belief the said Charles Tyler Prouty, Genevieve Prouty Gage, John A. Prouty and Elsinor Prouty Mallory severally received from The Boston Safe Deposit and Trust Company as Trustees as aforesaid an undivided one-fourth interest in said property and rights in this cause involved and as described in said agreement, as appears by conveyances of record in the Land Records of the City of Newport, Vermont.

20. That during the pendency of said agreement and the various trusts aforesaid, the petitioner has paid the payments in accordance with the agreement and from time to time, has paid such payments in the shares and to the parties as directed by orders and assignments in writing executed by the several owners.

21. That on information and belief, the said Charles Tyler Prouty, conveyed his undivided one-fourth interest in and to said property and rights to The Third National Bank & Trust Company of said Springfield which may hold said property and rights as trustee under terms of a trust indenture or agreement unknown to the petitioner whereby The Third National Bank & Trust Company now has or may claim to have and hold such interest in said property and rights and properly should be and hereby is made a petitionee herein. The petitioner, on information and belief, avers that the said Charles Tyler Prouty, by the terms of such trust or agreement, retained or claims to have some ownership, control or authority as to such share, properly should be and hereby is made a petitionee herein.

22. That on or above February 27, 1953, the said

Elsinor Prouty Mallory and her husband, Howard A. Mallory, made, executed and delivered a mortgage deed of the undivided one-fourth interest in and to said property and rights owned and held by the said Elsinor Prouty Mallory to the said Genevieve Prouty Gage as appears of record in the Land Records of said City of Newport, which mortgage is not discharged or otherwise released of record; and by reason thereon the said Genevieve Prouty Gage as mortgagee of said interest properly should be and hereby is joined as a petitionee herein.

23. That in accordance with said agreement and subsequent assignments and orders in writing now in effect, petitioner has been and currently is paying the monthly installments in the following shares:

One-fourth to The Third National Bank & Trust Company

One-fourth to John A. Prouty, c/o Citizens Savings Bank & Trust Company, attention Donald McGregor, Asst. Treas.

One-half to Genevieve Prouty Gage

WHEREFORE, petitioner prays that an Order be made by the Commission entitling the Petitioner to condemn said property and interests therein as above described; that the Commission fix a time and place for hearing hereon; that the Commission issue its citation to each of the petitionees, as provided by law, directing them and each of them, to appear herein and show cause, if any they or any of them may have, why such Order should not be made herein; that upon hearing in this cause, the Commission assess and determine the compensation to be paid for such property and interests therein and determine the time and manner of payment to be made by the petitioner to the petitionees, and for such further Order, direction or determination herein as shall be provided by law and to the Commission shall seem meet.

Dated at the City of Newport in the County of Orleans this 21st day of March, A. D. 1956.

CITIZENS UTILITIES COMPANY
(Newport Electric Division)

By: A. A. FLORY
Its Manager and authorized agent.

CLIFTON G. PARKER,
Attorney for Petitioner

STATE OF VERMONT }
ORLEANS COUNTY, ss. }

I, A. A. Flory, of the City of Newport in the County of Orleans and State of Vermont, solemnly swear that I am Manager of the Newport Electric Division of Citizens Utilities Company and authorized by said Company to execute the foregoing petition in its behalf; that I have read the foregoing Petition, know the contents thereof, and that the same is true of my own knowledge except as to matters stated upon information and belief, and that as to such matters, I believe them to be true.

s/ A. A. FLORY

Subscribed and sworn to before me this 19th day of March, A. D. 1956.

s/ F. W. KIPP
Notary Public

Clifton G. Parker recognized to each of the petitioners named in said petition in the sum of two hundred dollars, as surety for the costs of prosecution, as the law directs.

Before me,

s/ FLORENCE S. SMITH
Clerk; Public Service Commission

The agreement attached to this petition is not printed, as it is printed on pages 19a - 23a of the appendix filed in the certified record.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 206—October Term, 1957.

(Argued April 9, 1958 Decided July 3, 1958.)

Docket No. 24820

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THE THIRD NATIONAL BANK AND TRUST COMPANY,

Plaintiffs-Appellees,

—v.—

CITIZENS UTILITIES COMPANY,

Defendant-Appellant.

Before:

SWAN, HINCKS and MOORE,

Circuit Judges.

Appeal from the United States District Court for the District of Vermont, Ernest W. Gibson, *Judge*. Reversed.

GALLOP, CLIMENKO AND GOULD of New York, N. Y. and CLIFTON G. PARKER of Morrisville, Vermont, *Attorneys for Appellant*. Milton S. Gould and Arthur S. Friedman of Counsel.

HAROLD I. O'BRIEN of Rutland, Vermont, and ARTHUR GRAVES of St. Johnsbury, Vermont, *Attorneys for Appellees*. Edwin W. Lawrence of Counsel.

SWAN, *Circuit Judge*:

This is an appeal by defendant from a judgment for plaintiffs in a suit for specific performance of a contract to buy land located in the City of Newport, Vermont. Federal jurisdiction was based on diversity of citizenship between the respective parties. The defendant, a public utility corporation supplying electric power locally and in interstate and foreign commerce, was in possession of the property under a 25 year lease made in 1930 between the plaintiffs' predecessor in title, as lessor, and the defendant's predecessor, as lessee. The lease provided that it should enure to the benefit of, and be binding upon, the heirs, successors and assigns of the respective parties. By the terms of the lease the defendant was obligated to buy, and the plaintiffs to sell, the leased property within six months after the termination of the lease on October 1, 1955, at a price to be agreed upon, or failing agreement, at a price to be determined by condemnation proceedings to be instituted by the defendant within said six months period "before the tribunal then having jurisdiction of such proceedings." If such proceedings were not instituted, the price to be paid for the property was $300,000. No agreement as to price having been reached, the defendant, on March 27, 1956, filed a timely petition for condemnation with the Vermont Public Service Commission pursuant to sections 9331-9333 of Vermont Statutes, Revision of 1947. The plaintiffs were named as defendants to this petition which is still pending, and no action upon it has been taken by the Vermont Commission.

On May 11, 1956, the plaintiffs brought the present suit for specific performance of their contract with the defendant. The property involved is located astride the Clyde River, which is a principal tributary of Lake Memphrema-

gog. The only issue of fact in dispute was whether the Clyde River was a navigable stream.[1] An advisory jury returned a verdict that the river was a navigable stream within the meaning of the Federal Power Act, Chapter 12 of Title 16 U. S. C. A. Judge Gibson approved the jury's verdict. He found also, as admitted by the pleadings in the federal suit, that the defendant had not applied for or obtained from the Federal Power Commission a license for constructing, operating and maintaining its facilities along, over, or in the Clyde River, and had not filed with the Federal Power Commission a declaration of its intention to construct such facilities, pursuant to §23 of the Federal Power Act, 16 U. S. C. A. §817. Because of these findings the trail judge held that the Vermont Public Service Commission was without jurisdiction to hear and determine the petition for condemnation pending before it, and consequently the defendant had defaulted under its contract and was obligated to purchase the property at the price of $300,000. The decree appealed from so directed. Judge Gibson's opinion is reported in 150 F. Supp. 892.

The opinion of the district court and the briefs of the parties in this court have taken a much wider range than we think necessary for disposition of the appeal. In our view the decision can rest on a principle of narrow compass. Necessary to the harmonious cooperation of federal and state tribunals is the well recognized rule that the court first assuming jurisdiction over property may maintain and exercise its jurisdiction to the exclusion of the other.[2] The petition for condemnation was a suit *in rem*, where the state tribunal must control the property to give effect to its jurisdiction.[3] Obviously, the federal courts could not decree specific performance of defendant's contract to buy the land without violating the above mentioned

1 The complaint also prayed for an injunction to restrain the defendant from prosecuting its condemnation proceeding. Since the decree for specific performance was dispositive of the case, the requested injunction was denied.

2 *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477; *Princess Lida, etc.* v. *Thompson*, 305 U. S. 456, 466; *Manderville* v. *Canterbury*, 318 U. S. 47, 48.

3 *United States* v. 625.91 *Acres of Land, etc.* (D. C. Mo.), 49 F. Supp. 997, 1000.

principle of cooperation between state and federal tribunals. Although the district court did not grant the requested injunction against prosecution of the condemnation petition, its decree was as effective an interference with that proceeding as an injunction would have been. The granting of such an injunction is prohibited by 28 U. S. C. A. §2283. See *National Quarries Co.* v. *Detroit T. & I. R. Co.*, 6 Cir., 10 F. 2d 139, 140. There a bill in the federal court to enjoin the defendant's prosecution of a state suit to condemn land was dismissed.

Any objection which the plaintiffs wished to make to jurisdiction of the state tribunal could have been as effectively urged before it as in the federal court, and its decision could have been reviewed as provided in the Vermont statutes, and ultimately, if a federal question were involved, by the Supreme Court of the United States. We think the court below erred in holding that the Public Service Commission lacked jurisdiction. That was an issue for that tribunal to decide for itself subject to review as above stated.

Accordingly the decision on appeal is reversed; but we do not direct that the federal suit be dismissed because, if the question of jurisdiction should ultimately be decided in the appellees' favor, the pendency of the federal suit will prevent the running of any statute of limitations.

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EXCERPTS FROM SECTIONS [illegible] ERAL POWER ACT TITLE 16 U. S. CODE [illegible] TATED.

"Sec. 797. GENERAL POWERS OF COMMISSION.

* * * * *

The Commission is hereby authorized and empowered

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof,

or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states. * * *

"Provided further, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of War."

* * * * * *

"SEC. 814. EXERCISE BY LICENSEE OF POWER OF EMINENT DOMAIN.

When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance or operation of any dam, reservoir, diversion structure or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts."

* * * * * *

"SEC. 817. PROJECTS NOT AFFECTING NAVIGABLE WATERS; NECESSARY FOR FEDERAL LICENSE.

It shall be unlawful for any person, State or municipality, for the purpose of developing electric power, to construct, operate or maintain any dam, water conduit, reser-

voir, power house, or other works, incidental thereto across, along or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws."

Office-Supreme Court, U.S.
FILED
OCT 2 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 331

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINORE PROUTY MALLORY AND THIRD NATIONAL BANK AND TRUST CO.,

Petitioners,

vs.

CITIZENS UTILITIES COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF CITIZENS UTILITIES COMPANY IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINORE PROUTY MALLORY AND THIRD NATIONAL BANK AND TRUST CO., *Petitioners,* vs. CITIZENS UTILITIES COMPANY, *Respondent.*	No. 331

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF CITIZENS UTILITIES COMPANY IN OPPOSITION

Citizens Utilities Company files this Brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The Opinion of the Court of Appeals is not yet officially reported. It is set forth in the Appendix to the Petition, pages 28-31 and at R. 51a-54a.

JURISDICTION

On July 3, 1958, the Court of Appeals for the Second Circuit (Swan, Hincks and Moore, Circuit Judges) unani-

mously reversed (R. 51a-54a) a final judgment in favor of Petitioners made in the United States District Court for the District of Vermont (Ernest W. Gibson, District Judge) (R. 33a-48a). Petitioners' motion in the Court of Appeals to stay issuance of its mandate to the District Court was denied.

The Petition herein distills to a plain attempt to obtain a second general, appellate review of the case. Analysis of the Petition demonstrates the utter lack of any of the substantive considerations required by the Rules of this Court to justify the grant of a writ herein. Rule 19, Supreme Court Rules.

QUESTIONS PRESENTED

Where an *in rem* proceeding to condemn lands has been commenced before a State Tribunal, whether Respondents therein (Petitioners here) may thereafter (a) maintain an action in the United States District Court for an original determination by that Court that the State Tribunal lacks jurisdiction of the pending condemnation proceeding and (b) based thereupon, obtain a judgment in the District Court effectively enjoining further proceedings in the State condemnation proceeding by compelling Respondent to accept and pay for a deed to the lands sought to be condemned.

STATUTES INVOLVED

The Petition omits reference to constructive service provisions of the Vermont Statutes, applicable to actions affecting title to real property located within the state, which establish that Petitioners' action in the District Court was at least *quasi in rem*. (Vermont Statutes, Revision of 1947, Sections 2130-2138, App. A., *infra*, pp. 1a-2a.)

Section 2283 of Title 28, U. S. C., is set forth in Appendix A, *infra*, p. 2a.

STATEMENT

On October 1, 1955, Respondent and Petitioners were parties by succession to a contract of lease of certain lands belonging to Petitioners located in the State of Vermont (R. 5a). The contract provided that within six months of October 1, 1955, Respondent would purchase, and Petitioners would sell, the property at a price satisfactory to the parties. If no voluntary agreement was reached, Respondent was obligated within the six month period to

> "institute proceedings to acquire the property * * * by condemnation * * * before the tribunal then having jurisdiction of such proceedings." (R. 21a)

If Respondent did not acquire the property by either of the two methods described, it was required to pay $300,000 therefor (R. 21a-22a).

The parties failed to agree on a price for the property (R. 6a). On March 27, 1956, admittedly within the stipulated six month period, Respondent initiated a conventional condemnation proceeding before the Vermont Public Service Commission (R. 9a, 49a), the tribunal invested by Vermont Law with jurisdiction in the premises. Sections 9331-9333, Vermont Statutes, Revision of 1947 (R. 49a-50a).

Almost two months after Respondent began its condemnation proceedings, Petitioners commenced this action in the District Court (R. 1a).

The Complaint prayed judgment of specific performance of the agreement to compel Respondent to accept a deed to the property and to pay Petitioners the sum of $300,000 therefor (R. 10a). It also prayed that "an appropriate injunction order" issue out of the District Court

> "restraining the defendant from asserting that the Honorable Public Service Commission of the State of Vermont has jurisdiction of the petition for con-

> demnation brought by the defendant against the plaintiffs, and further restraining the defendant from the prosecution of said petition before the Vermont Public Service Commission during the pendency of these proceedings * * *" (R. 10a-11a).

The material allegations of the Complaint claimed by Petitioners to justify the relief sought therein, were (R. 6a-10a):

"That the lands in question were located along the Clyde River in the State of Vermont; that such river was a "navigable" river within the meaning of the Federal Power Act; that Respondent had not applied for nor obtained a license from the Federal Power Commission for its facilities located along that River; that Respondent had not filed with the Federal Power Commission any declaration of intention to construct facilities located along the Clyde River; that by reason of the foregoing the Public Service Commission of the State of Vermont was, is, and in the future would be without jurisdiction or authority to adjudicate Respondent's Petition for condemnation because a license under the Federal Power Act is an indispensable condition and prerequisite

> "for the institution of eminent domain proceedings or condemnation proceedings before the Public Service Commission of Vermont or any other tribunal for purpose of acquiring the plaintiffs' said lands and real estate . . ." (R. 10a)

Respondent's Answer (12a-18a) set forth denials and also interposed affirmative defenses which were made the grounds of motions to dismiss in the District Court (R. 25a-32a).

Respondent's motions were denied (R. 34a, 42a-47a). An advisory jury returned a verdict of "navigability" which was accepted by the District Judge (R. 34a, 40a). The

District Judge issued a written Decision and Judgment Order which overruled all of Respondent's objections; adjudicated, as a matter of first instance, the "navigability" of the Clyde River; upheld the Court's right to pass upon Petitioners' objections to the jurisdiction of the Vermont Public Service Commission; and on the basis of the foregoing, determined that the Vermont Public Service Commission lacked jurisdiction over Respondent's Petition for condemnation and decreed specific performance in favor of Petitioners (R. 33a-48a).

The Court of Appeals based its reversal on three distinct grounds (R. 51a-54a). It held that the District Court's decree was barred by application of the rule of comity as between Federal and State courts (R. 53a-54a). Second, while the requested injunction had not been granted by the District Court, the Court of Appeals, holding that the District Court's decree was as effective an interference with the Vermont Public Service Commission proceeding as if such injunction had been granted, concluded that the District Court was barred from granting such relief under the provisions of Section 2283, Title 28, U. S. C. (R. 54a). Finally, the Court of Appeals held that the District Court erred in assuming to pass upon Petitioners' objections to the jurisdiction of the Vermont Public Service Commission since Petitioners' objections to that jurisdiction could and should have been presented for ruling (as indeed they were), to the Vermont Commission in the first instance subject to Petitioners' rights of appeal from any decision therein (R. 54a).

The Court of Appeals deemed it unnecessary to review other challenged findings which, together with the specific grounds upon which the reversal rested, were indispensable to the District Court's decree (R. 53a).

ARGUMENT

1. The Court of Appeals Correctly Held That Comity Precluded Petitioners From Maintaining Their Action In The United States District Court

The Court of Appeals held: (R. 53a-54a)

> "Necessary to the harmonious cooperation of federal and state tribunals is the well recognized rule that the court first assuming jurisdiction over property may maintain and exercise its jurisdiction to the exclusion of the other. The petition for condemnation was a suit *in rem*, where the state tribunal must control the property to give effect to its jurisdiction. Obviously, the federal court could not decree specific performance of defendant's contract to buy the land without violating the above mentioned principle of cooperation between state and federal tribunals."*

The determination of the Court of Appeals was correct.

Petitioners, in their effort to create an issue appropriate for this Court's consideration, argue strenuously that the Court of Appeals' application of the rule of comity to this case is at variance with decisions of this Court. Among other cases, Petitioners cite *Commonwealth Trust Co. v. Bradford*, 297 U. S. 613 (1935), *Kline v. Burke Construction Co.*, 260 U. S. 226 (1922) and *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33 (1909). (Petition, pp. 5, 6, 7, 9, 11).

An examination of each of these cases demonstrates that far from controverting the principle relied on by the Court of Appeals, each of them contains the validity of that principle and its applicability here.

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*Citing *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, 477; *Princess Lida of Thurn & Taxis v. Thompson*, 305 U. S. 456, 466; *Markham v. Cabell*, 326 U. S. 404, 408; *Penn General Casualty Co. v. Pennsylvania ex rel. Schnader*, 294 U. S. 189, 195; *Moore v. Mitchell*, 30 F. 2d 600, 602, aff'd 281 U. S. 18, 21; *Clarke v. McDade*, 165 U. S. 168, 175; *Harkness v. Hyde*, 98 U. S. 476, 479; *Taylor v. Carryl*, 20 How. 583, 595; *Fisher v. Perkins*, 318 U. S. 47, 48 and *United States v. 625.91 Acres Of Land, etc.*, (D. C. Mo.), 40 F. Supp. 997, 1000.

In *Kline*, this Court held that the two actions under consideration did not involve *res*. The Court said, at p. 229:

> "* * * Where the action is in rem the effect is to draw to the federal court the possession or control, actual or potential, of the res, and the exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction."

In *Waterman*, this Court similarly acknowledged the rationale of the rule. Finally, in *Commonwealth Trust Co.*, the case was decided on the express finding that the second suit did not seek to interfere with the *res* of the first action. 297 U. S. 613 at pp. 618, 619.

Petitioners raise two further arguments in opposition to this holding. First, Petitioners say that the proceeding before the Virginia Public Service Commission was simply one to fix a price for the property (Petition, pp. 3, 4, 11, 13 *et seq.*). The latter, according to Petitioners, it was not really *in rem*. This contention, made for the first time herein, is untenable.

The condemnation Petition filed by Respondent in the State Tribunal contained a Prayer (App. B, *infra*, p. 3a.) in the conventional form seeking (1) a determination in accordance with provisions of law of Respondent's *entitlement* to condemn, thereafter (2) a determination of compensation and (3) a ruling as to the time and manner of payment thereof (R. 9a, 13a, 14a, 15a, 16a, 40a). Clearly, Petitioners are in error in their attempt to circumscribe the otherwise plain purpose of the condemnation proceeding.

The agreement between the parties also demonstrates the error of Petitioners' argument. That agreement provides that Respondent was to initiate proceedings "to *acquire* the property * * * by condemnation" (emphasis supplied) (R. 21a). It is meaningless for Petitioners to argue that Respondent's "possession" under the agreement eliminated the need for condemnation (Petition, pp. 3, 11, 13 *et seq.*). Respondent's eminent domain proceeding was to acquire *title* to the lands.

In reality, Petitioners' improvised argument now would characterize Respondent's proceedings before the State Tribunal as nothing more nor less than a private arbitration. That characterization is wholly without support; it is at variance with the express allegations of Petitioners' own Complaint, wherein they asserted that Respondent had undertaken to "*acquire* said lands * * * by condemnation proceedings" (emphasis supplied) (R. 9a).

The second argument advanced by Petitioners is that even if the proceeding in the State Tribunal was *in rem*, the action instituted by them in the District Court was *in personam* only (Petition, p. 13). Notwithstanding the content of Prayer of their Complaint (R. 10a), the form of the District Court's Judgment (R. 47a), and the Prayer of the Condemnation Petition (App. B, *infra*, p. 3a) Petitioners say that "the question of whether or not the respondent should acquire title to the Petitioner's (sic) property is not an issue." (Petition, p. 15). Therefore, Petitioners claim that their action is not barred by the rule of comity.

The imperfections inhering in use of the label "*in personam*" have been commented upon. *City of Fresno v. Edmonston*, 131 F. Supp. 421, 424 (D. C. Calif. 1955). In this case, the glib use of that label is altogether misleading. Control over the property was indispensable to the condemnation proceeding in the State Tribunal. *United*

States v. 625.91 Acres etc., supra, and that control attached at the time of commencement of the State proceeding. *Princess Lida, etc. v. Thompson, supra*, at p. 446.

The action instituted by Petitioners plainly sought to, and did, interfere with the State Tribunal's control over the property in question. Petitioners' Complaint specifically sought a decree requiring Respondent to take title to the property (R. 10a). Had the decree of the District Court been carried out, title to the property would have passed to Respondent, and the State Tribunal would have been without any *res* upon which its orders could operate. As is plainly indicated by the Opinion of the Court of Appeals, there could not be a more effective interference with the State Tribunal's control over the lands sought to be condemned therein (R. 54a).

The Vermont Statutes, which specifically provide for constructive service of process upon non-residents in actions including those for specific performance of contracts to purchase real property in the State, are further confirmation that Petitioners' action in the District Court is at the least *quasi in rem* (Sections 2136-2138, Vermont Statutes, Revision of 1947, App. A, *infra*, pp. 1a-2a).

By any test, evolved either from the pleadings or the decree in the District Court, Petitioners' action could not be maintained in consonance with the rules of comity. The Court of Appeal's determination on this point was clearly correct.

2. The Court Of Appeals Correctly Held That The District Court Could Not Enjoin The Condemnation Proceeding Pending In The State Tribunal

Although the Complaint prayed for an injunction to restrain further prosecution of the Vermont condemnation proceeding, that injunction was not granted (R. 47a). Nevertheless, the Court of Appeals stated: (R. 54a).

> "Although the district court did not grant the requested injunction against prosecution of the condemnation petition, its decree was as effective an interference with that proceeding as an injunction would have been. The granting of such an injunction is prohibited by 28 U. S. C. A. § 2283. See *National Quarries Co.* v. *Detroit T. & I. R. Co.* 6 Cir., 10 F. 2d 139, 140. There a bill in the federal court to enjoin the defendant's prosecution of a state suit to condemn land was dismissed."

Petitioners recognize that the correctness of this holding furnishes separate grounds for denial of their Petition (Petition, p. 10). They advance two arguments in reply.

First, Petitioners argue that by some unspecified legerdemain, the proscriptions of Section 2283 of Title 28, U. S. C. are inapplicable to this case and that *National Quarries*, cited by the Court of Appeals, is no longer effective in view of amendments to Section 2283 (Petition, p. 10). The argument is plainly without merit.

There have been at least two cases, decided after the amendment of Section 2283, both involving state condemnation proceedings, which have reached exactly the same result. *Collins* v. *Laclede Gas Company*, 237 F. 2d 633 (8th Cir. 1956), cert. den. 352 U. S. 1025, app. dism. 353 U. S. 919; *Evans* v. *St. Louis Housing Authority*, 226 F. 2d 750 (8th Cir. 1955), cert. den. 350 U. S. 993. No case has been found which has even suggested a contrary result.

The second argument advanced by Petitioners in support of the claimed propriety of the requested injunction rests upon the assertion that the Vermont Public Service Commission, for purposes of Respondent's condemnation proceeding, is not a "court" within the meaning of Section 2283 (Petition, pp. 15-17). This contention is entirely without substance. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226 (1908).

This Court has held that this "question depends not upon the character of the body, but upon the character of the proceeding." *Prentis* v. *Atlantic Coast Line, supra*, at p. 226. Petitioners do not even attempt to argue that the Vermont Public Service Commission does not exercise a *judicial* function in its jurisdiction over condemnation proceedings. Plainly, even the Vermont cases cited by Petitioners (Petition, pp. 15-16), establish that the Commission acts in a judicial capacity in such matters.

In *Collins* v. *Laclede Gas Company, supra*, the condemnation proceeding sought to be enjoined by the District Court was one which was pending before the Missouri Public Service Commission. The Court of Appeals characterized that Commission as follows (237 F. 2d 633, at 634):

> "Defendant Missouri Public Service Commission is a state administrative board or commission authorized to determine the rights of gas storage companies to exercise the power of eminent domain."

The Court of Appeals, in approving the District Court's findings, agree (237 F.2d 633, at 635):

> "'1. That the necessary effect of granting the relief sought in the complaint herein will be to stay proceedings *in a state court*.'" (Emphasis supplied)

The Court of Appeals application of the clear proscription of Section 2283, Title 28, U. S. C. was correct. Petitioners' arguments present no question of substance for review by this Court.

3. The Court Of Appeals Was Correct In Holding That The District Court Should Not Have Passed Upon Petitioners' Objections To The State Tribunal's Jurisdiction.

Respondent argued in the District Court that any objections which Petitioners had to the jurisdiction of the

State Tribunal should have been presented by Petitioners to that tribunal and adjudicated therein (R. 18a, 25a-26a). In fact, such objections were interposed by Petitioners before the Public Service Commission. Essentially, they were the same as the substantive allegations of Petitioners' Complaint. The Court of Appeals said: (R. 54a)

> "Any objection which the plaintiffs wished to make to jurisdiction of the state tribunal could have been as effectively urged before it as in the federal court, and its decision could have been reviewed as provided in the Vermont statutes, and ultimately, if a federal question were involved, by the Supreme Court of the United States. We think the court below erred in holding that the Public Service Commission lacked jurisdiction. That was an issue for that tribunal to decide for itself subject to review as above stated."

If the District Court had not held that the State Tribunal was without jurisdiction, Petitioners could not have obtained their decree (R. 46a-47a). That finding was indispensable to the District Court's determination. As such, the correctness of the Court of Appeals' Opinion on this point provided another separate and distinct ground for reversal of the District Court's decree.

Petitioners' attempt to circumvent the determination of jurisdictional objections by the tribunal in which the proceeding was pending was improper. *Baber* v. *Texas Utilities Co.*, 228 F. 2d 665 (5th Cir. 1956); aff'g. 128 F. Supp. 753; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492 (1955); *United States* v. *Western Pacific R. Co.*, 353 U. S. 359 (1956); *Carson* v. *Board of Education*, 227 F. 2d 789 (4th Cir. 1955); *West* v. *Bank of Commerce & Trusts*, 167 F. 2d 664 (4th Cir. 1948). See also *Cook* v. *Davis*, 178 F. 2d 595 (5th Cir. 1949) cert. den. 340 U. S. 811; *Texas Co.* v. *Montgomery*, 73 F. Supp. 527 (D. C. La. 1947) aff'd. 332 U. S. 827.

4. Additional Findings Of The District Court, Which Were Indispensable To Its Decree, Were Erroneous And Would Preclude The Grant Of Any Relief To Petitioners

The Court of Appeals based its reversal on the issues considered in Points 1-3 above (R. 53a). The Court held it unnecessary to consider the correctness of certain additional findings made by the District Court. These were:

1. That the Clyde River was "navigable" within the meaning of the Federal Power Act (R. 40a);

2. That Respondent's failure to obtain a license from the Federal Power Commission constituted a violation of the Federal Power Act and thereby barred Respondent from resort to otherwise available state condemnation procedures (R. 41a, 46a-47a); and

3. That Petitioners had standing under the Federal Power Act to raise questions of compliance therewith in private litigation (R. 42a-43a).

The District Court determined all of these issues, over Respondent's objections, in favor of Petitioners.

a. The District Court Was Without Jurisdiction To Make An Original Determination Of "Navigability" Under The Federal Power Act.

The Federal Power Commission had not at the time of Decision in the District Court made any determination of "navigability" of the Clyde River. Admittedly, the District Court's determination of that issue was a determination of first instance. It was indispensable to the District Court's decree. According to the theory of the Complaint and the District Court's Decision, without a finding of "naviga-

bility" there could be no basis for any interference with the Public Service Commission.

The District Court plainly did not have jurisdiction to make an original determination of "navigability" under the Federal Power Act. That determination violated the doctrine of primary administrative jurisdiction. *United States* v. *Western Pacific R. Co.*, *supra*; *Interstate Natural Gas Co.* v. *Southern California Gas Co.*, 102 F. Supp. 685 (D. C. Calif. 1952), followed by *Interstate Natural Gas Co.* v. *Southern California Gas Co.*, 103 F. Supp. 317 (D. C. California 1952) aff'd. 209 F. 2d 380 (9th Cir. 1953); *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802 (1946); *Michigan Consol. Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784 (6th Cir. 1946).

b. Licensing Under The Federal Power Act Is Not A Prerequisite To Resort To State Condemnation Procedures

Even if it be assumed, *arguendo*, that the District Court could make an original determination of "navigability" and could determine that Respondent should have been licensed under the Federal Power Act, nevertheless those findings could not justify a holding that Respondent was debarred from resort to state condemnation procedures.

The Eminent Domain provision of the Federal Power Act (Title 16, U. S. C., Section 814), was intended to be supplementary to existing state procedures and in no way restrictive thereupon. *Oakland Club* v. *South Carolina Public Service Authority*, 110 F. 2d 84 (4th Cir. 1940); *Harris* v. *Central Nebraska Public Power & Irrigation District*, 29 F. Supp. 425 (D. C. Neb. 1938).

Particularly in view of the District Court's concession of the novelty of the point (R. 40a), and the complete absence of any authority, statutory or otherwise, to oust the State Tribunal of its otherwise plain jurisdiction (R. 49a-

50a), there simply was no basis for the District Court's holding.

c. Petitioners Had No Standing In The District Court To Raise And Litigate Questions Involving Determinations Committed To The Competence Of The Federal Power Commission.

Respondent argued before the District Court that Petitioners, as private litigants, could not properly raise for determination the question of "navigability" and the question of Respondent's alleged non-compliance with the Federal Power Act (R. 17a-18a). The District Court rejected this argument (R. 42a). In so doing, it erred. *Amalgamated Clothing Workers of America* v. *Richman Brothers Co.*, 348 U. S. 511 (1955); *Johnson* v. *Chesapeake & Ohio Railway Company*, 188 F. 2d 458 (4th Cir. 1951), cert. den. 342 U. S. 843; *Meyercheck* v. *Givens*, 180 F. 2d 221 (7th Cir. 1950); *Conter* v. *South Carolina Public Service Authority*, 91 F. Supp. 262 (D. C. S. C. 1950).

CONCLUSION

The Decision of the Court of Appeals remits Petitioners to the State Tribunal for the determination of their objections to that body's jurisdiction. That decision was clearly correct and poses no question, substantial or otherwise, for review by this Court.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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APPENDIX A

Sections 2136, 2137 and 2138 of the Vermont Statutes, Revision of 1947, provide:

"2136. *Delivery of copy.* When an action is commenced at law or in equity, an absent defendant, residing or being without the state so that process cannot be served on him, may be notified of the pendency of such action and given opportunity to make defense therein, by the delivery to him personally, at any place within or without the state, of copies of the process and pleading, and of an order for such delivery, stating the time and place when and where he is required to appear, all under the hand of the clerk or a magistrate of the court wherein the action is pending. County clerks may issue such orders and certify such copies in or out of term time, and before and after the entry of such action in court."

"2137. *Service within or without the state.* When such delivery is to be made without the state, the order may provide that delivery of such copies shall be made by any sheriff, deputy sheriff, constable, notary public or attorney at law, not a party or related to either party, without special designation by name, and the proof of delivery thereof shall be by affidavit, stating the time and place of delivery, the age of the deponent, or that he is above twenty-one years of age, his occupation and the reason why he knew the person to whom the copies were delivered to be the person mentioned therein as a party. If delivery is to be made within the state, it shall be made in the manner herein provided for delivery without the state, except that the order for delivery may be directed only to any sheriff or constable in the state."

"2138. *Effect of notice.* Upon such notice so given to a party at least twenty-one days before the time when he is required to appear, the same pro-

ceedings may be had, so far as to effect the title or right to the possession of goods, chattels, rights, credits, land, tenements or hereditaments in the state, as if such process or pleading had been served on a party in the state before entry."

Section 2283 of Title 28, U. S. C., provides as follows:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

APPENDIX B

The Prayer of Respondent's Petition for condemnation in the Vermont Public Service Commission is as follows:

> "WHEREFORE, petitioner prays that an Order be made by the Commission entitling the Petitioner to condemn said property and interests therein as above described; that the Commission fix a time and place for hearing hereon; that the Commission issue its citation to each of the petitionees, as provided by law, directing them and each of them, to appear herein and show cause, if any they or any of them may have, why such Order should not be made herein; that upon hearing in this cause, the Commission assess and determine the compensation to be paid for such property and interests therein and determine the time and manner of payment to be made by the petitioner to the petitionees, and for such further Order, direction or determination herein as shall be provided by law and to the Commission shall seem meet."